COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP30 **Cir. Ct. No. 2002CF6201**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARLON O. EVANS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. In 2003, a jury convicted Marlon O. Evans of six counts of armed robbery, as a party to a crime, and acquitted him of two counts of armed robbery, as a party to a crime. *See* WIS. STAT. §§ 943.32(2), 939.05 (2001–02). We affirmed on his direct appeal. *See* ***State v. Evans***, No. 2004AP2204-CR,

unpublished slip op. (WI App June 7, 2005). The supreme court denied review. Evans now appeals *pro se* an order denying his WIS. STAT. § 974.06 motion for postconviction relief. Evans's § 974.06 motion claimed that his trial and postconviction lawyers were ineffective. *See* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136, 139 (Ct. App. 1996) (ineffective assistance of postconviction counsel may be a sufficient reason for failing to have previously raised the issues). The trial court held a hearing under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), and denied Evans's motion. We affirm.

¶2 A defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer was deficient, and (2) the defendant suffered prejudice as a result. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To satisfy the prejudice aspect of ***Strickland***, the defendant must demonstrate that the lawyer's errors were sufficiently serious to deprive him or her of a fair trial and a reliable outcome, ***ibid.***, and "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," ***id.***, 466 U.S. at 694. We need not address both aspects if the defendant fails to make a sufficient showing on either one. ***Id.***, 466 U.S. at 697.

¶3 Evans contends that his postconviction lawyer was ineffective because the lawyer did not: (1) argue that Evans's trial lawyer should have interviewed and called to testify at the trial those whom Evans contends were two alibi witnesses, and (2) adequately assert that Evans's trial lawyer should have introduced at the trial letters from persons alleged to be Evans's co-actors that Evans argues exculpate him. We address each contention in turn.

A. *Alibi defense*.

¶4 Evans claims that his trial lawyer should have interviewed and called Evans's girlfriend, Kimberly Coleman, and Evans's nephew's girlfriend, Andrea Davis, to testify at trial. Evans contends that their testimony would have established that Evans did not commit the robberies because Evans was at home with Coleman and Davis during the robberies. Evans does not show, however, how he was prejudiced by his trial lawyer's alleged deficiency.

¶5 The first robbery was on October 15, 2002, around 7:00 p.m. At his trial, Evans testified that on October 15 he was at home all night. In affidavits attached to Evans's WIS. STAT. § 974.06 motion, Coleman and Davis claimed that they would have testified that on the night of October 15 they were with Evans at his house. While Coleman's and Davis's proffered testimony would have supported Evans's claim that he was at home when the October 15 robbery happened, it is unlikely that it would have changed the outcome of the trial in light of Evans's confession, which he does not challenge on appeal.[1]

¶6 During Evans's cross-examination, the prosecutor questioned Evans about his statement to the police describing his involvement in the October 15 robbery. Evans does not explain how Coleman's and Davis's testimony would have aided his defense in light of his voluntary confession or the fact that Coleman could have, as discussed below, been impeached for procuring or fabricating at

[1] The trial court held a hearing under ***Miranda v. Arizona***, 384 U.S. 436 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), and concluded that Evans's confession was voluntary. Evans does not contest this ruling on appeal.

least two exculpatory letters from the alleged co-actors. He has not, therefore, established "prejudice" under the second aspect of the ***Strickland*** test.

¶7 The next three robberies occurred on the evening of October 21, 2002. Evans testified that on October 21 he was not home between 5:15 or 5:30 p.m. and 6:30 p.m. because he and several of those the State contended were complicit in the robberies went to the store. According to Evans, those alleged co-actors committed one of the robberies on the way home from the store, but he, Evans, was not involved. Evans denied that he was at the scene of the other two robberies.

¶8 Coleman averred that, except for a trip to a store from approximately 5:15 p.m. to 6:30 p.m., Evans was at home with her on the evening of October 21. Similarly, Davis, who arrived at Evans's house around 6:05 p.m., claimed that Evans came home around 6:30 p.m. As we have seen, however, Evans admitted he was involved in the crimes and, as also noted, does not challenge those confessions on this appeal. Accordingly, for the reasons expressed in ¶6, above, he has not established "prejudice" under the second aspect of the ***Strickland*** test.

¶9 The last two robberies happened on the evening of October 24, 2002. Evans testified that on October 24, he left the house to go to a store between 4:00 p.m. and 5:00 p.m. with four persons the State contended were complicit in the robberies. According to Evans, on the way to the store, the other men committed two robberies, but he was not involved. Coleman claimed that she would have testified that Evans left the house on October 24 to go to the store and that he told her:

> about nodding off in the back seat and being woke up when he heard someone yell there goes a car. After the incident, Marlon [Evans] told me, he told [one of the alleged co-

> actors] to take him back to his car … and on their way to his car, [the alleged co-actor] decided to rob somebody else.

Again, Evans admitted that he was at the scenes of the robberies. Accordingly, he was not prejudiced by his trial lawyer's failure to present Coleman and Davis. *See* ***State v. Harp***, 2005 WI App 250, ¶16, 288 Wis. 2d 441, 454–455, 707 N.W.2d 304, 311 ("'Since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.'") (quoted source and parentheses omitted).

¶10 In a related claim, Evans contends that his trial lawyer listed the wrong dates for Davis on his notice of alibi. The notice of alibi lists Davis as an alibi witness for robberies that happened on October 4, 17, and 23. Evans appears to argue that had his trial lawyer interviewed Davis he would have discovered that Davis could have provided him with an alibi for the October 15 and 21 robberies. Evans has shown neither deficiency nor prejudice.

¶11 At the ***Machner*** hearing, Evans's trial lawyer testified that Evans told him what dates to use in the notice of alibi. Acknowledging the trial court's implicit finding that Evans's trial lawyer was credible, *see* ***Johnson v. Merta***, 95 Wis. 2d 141, 151–152, 289 N.W.2d 813, 818 (1980) (determination of witness credibility left to trial court), Evans's trial lawyer was not ineffective for failing to discover information that was available to Evans, *see* ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 482, 634 N.W.2d 325, 332 (lawyer not deficient where information was available to defendant but defendant did not share it with lawyer). Moreover, Evans has not shown prejudice because, as we have seen,

Davis's proffered testimony would not have helped his defense or provided him with an alibi.

¶12 Finally, Evans claims that his trial lawyer was ineffective for telling the jury in his opening statement that Coleman and Davis would testify. Evans mischaracterizes the Record. Evans's trial lawyer did not tell the jury during opening statements that Coleman and Davis would testify. Rather, after the prosecutor listed the State's witnesses during *voir dire*, Evans's trial lawyer told the panel that Coleman and Davis were "potential witnesses." Evans's trial lawyer did not promise that he would definitely call Coleman and Davis to testify or that they would provide any particular testimony. Accordingly, Evans again fails to show either deficiency or prejudice. *Cf.* ***United States v. Brown***, 799 F.2d 134, 135–136 (4th Cir. 1986) (trial court abused its discretion when during *voir dire* it refused to allow defendant to read witness list and ask jurors if they knew any of the potential witnesses).

B. *Alleged exculpatory evidence*.

¶13 In Evans's postconviction motion and on his direct appeal, Evans's postconviction lawyer claimed that Evans's trial lawyer should have presented at trial letters from Evans's four alleged co-actors asserting that Evans did not participate in the robberies. ***Evans***, No. 2004AP2204-CR, unpublished slip op., ¶¶4, 7. We affirmed the trial court's decision to deny this claim without a ***Machner*** hearing because Evans's postconviction lawyer did not submit with the postconviction motion any evidentiary documents to support this claim. ***Id.***, No. 2004AP2204-CR, unpublished slip op., ¶7. In his WIS. STAT. § 974.06 motion, Evans claimed that his postconviction lawyer was ineffective because the lawyer did not submit any documents to support this claim and attached to his § 974.06

motion the letters his co-actors sent to Evans's trial lawyer before trial. Evans's trial lawyer testified at the ***Machner*** hearing he had a strategic reason for not presenting the letters.

¶14 At the ***Machner*** hearing, Evans's trial lawyer testified that he considered the letters a "double-edged sword" because to introduce them at trial, he would have had to call the alleged co-actors to testify and they told the police that Evans *did* participate in the robberies. Evans's trial lawyer noted that one of the alleged co-actors, Lamarcus C., a juvenile, testified for the State and he did not want anyone else implicating Evans in the robberies. Evans's trial lawyer also told the ***Machner***-hearing court that he was concerned about the authenticity of the letters because Lamarcus C. and another alleged co-actor, Dewight C., told law enforcement officials that they did not write the letters, claiming instead that Coleman wrote them.

¶15 Evans's trial lawyer's decision not to present the letters was a reasonable trial strategy. Three of the alleged co-actors did not testify at the trial. To introduce the letters, Evans's trial lawyer would have needed to call the co-actors to testify, and then possibly tried to use the letters to rehabilitate the witnesses if they gave testimony different than that as expressed in the letters. *See* WIS. STAT. RULE 908.01(4)(a)2 (An out-of-court statement is not hearsay if it is "[c]onsistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."); ***Lewandowski v. Preferred Risk Mut. Ins. Co.***, 33 Wis. 2d 69, 77, 146 N.W.2d 505, 509 (1966) (letters are hearsay). Further, if they had testified consistently with the letters, they could have been impeached with their statements to the police that Evans was involved in the robberies. Thus, it was reasonable for Evans's trial lawyer to conclude that trying to use the letters at trial would have

done more, much more, harm than good. *See* ***State v. Eckert***, 203 Wis. 2d 497, 514–515, 553 N.W.2d 539, 546 (Ct. App. 1996) (lawyer who did not call witness "who would have been more helpful to the State than to the defense" not ineffective).

¶16 Evans's trial lawyer's decision not to ask Lamarcus C. at trial about his letter was also reasonable. As Evans's trial lawyer testified, he questioned the letter's authenticity because Lamarcus C. claimed that he did not write it. *See* WIS. STAT. RULE 909.01 ("The requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). A lawyer who does not present evidence the lawyer reasonably believes is inadmissible is not ineffective. *See* ***State v. Coogan***, 154 Wis. 2d 387, 404–405, 453 N.W.2d 186, 192–193 (Ct. App. 1990). Accordingly, we affirm the trial court's order denying Evans's WIS. STAT. § 974.06 motion.[2]

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

[2] Evans appears to argue that he was prejudiced by the "totality of the omitted evidence." As noted, Evans's ineffective-assistance-of-postconviction-counsel claims fail on the merits. That ends our inquiry. *See* ***State v. Thiel***, 2003 WI 111, ¶61, 264 Wis. 2d 571, 606, 665 N.W.2d 305, 322–323 ("each act or omission must fall below an objective standard of reasonableness … in order to be included in the calculus for prejudice").